SUPREME COURT, U. S.
WASHINGTON, D. C. 20543

Nos. 76-419 AND 76-528

In the Supreme Court of the United States

OCTOBER TERM, 1976

VERMONT YANKEE NUCLEAR POWER CORPORATION,
Petitioner

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

BALTIMORE GAS AND ELECTRIC CO., ET AL.
Petitioners

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

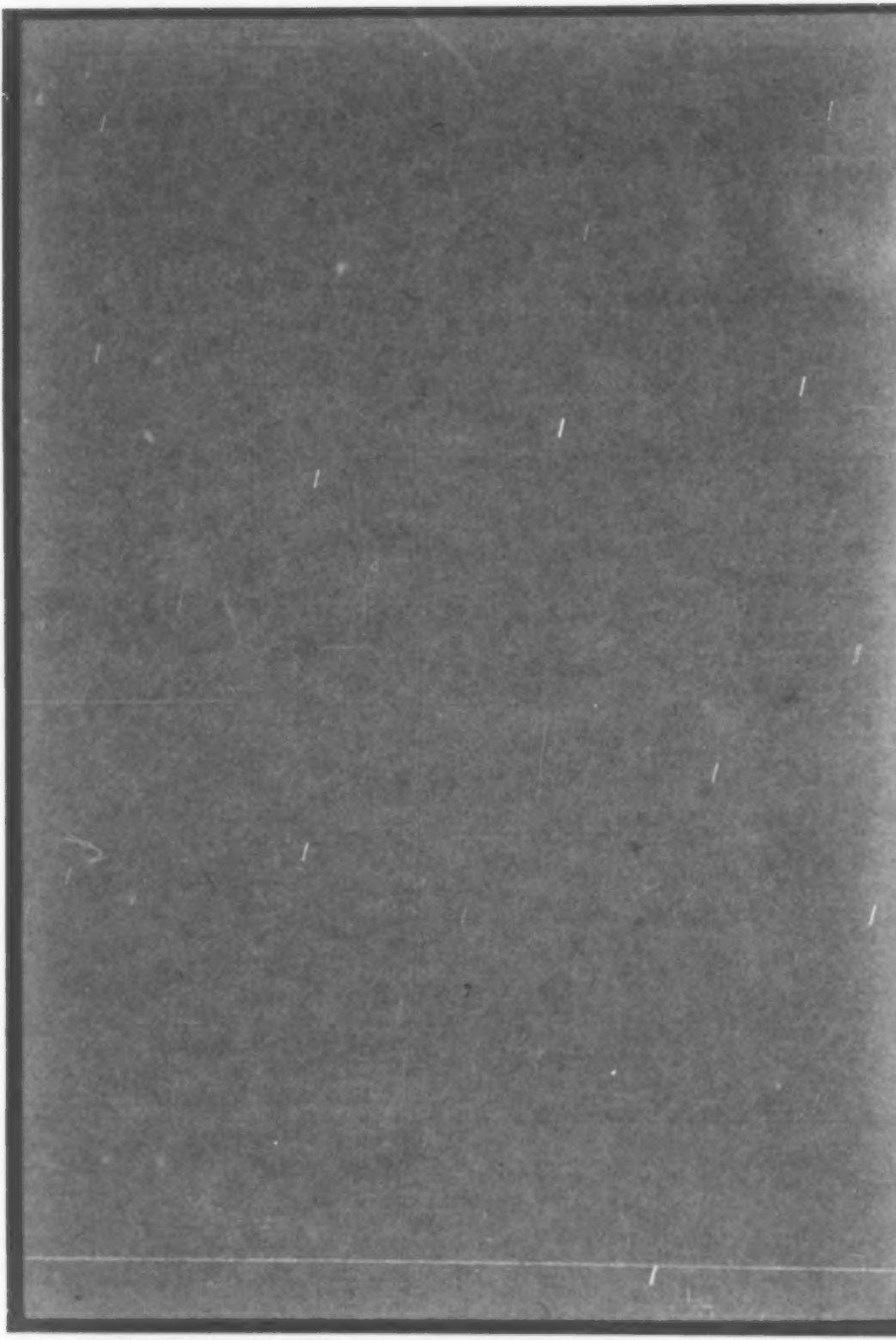
MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF FOR EDISON ELECTRIC INSTITUTE AND COMMONWEALTH EDISON COMPANY, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NIAGARA MOHAWK POWER CORPORATION, OMAHA PUBLIC POWER DISTRICT, POWER AUTHORITY OF THE STATE OF NEW YORK, AND ROCHESTER GAS AND ELECTRIC CORPORATION AS AMICI CURIAE

CAMERON F. MACRAE
LEBOEUF, LAMB, LEIBY
& MACRAE
140 Broadway
New York, New York 10005

Attorneys for Edison Electric Institute, et al.

Of Counsel:

LEONARD M. TROSTEN
HARRY H. VOIGT
JAMES P. MCGRANERY, JR.
LEBOEUF, LAMB, LEIBY & MACRAE
1757 N Street, N.W.
Washington, D.C. 20036



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Pursuant to this Court's Rule 42, Edison Electric Institute ("EEI"), and Commonwealth Edison Company, Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation, Omaha Public Power District, The Power Authority of the State of New York, and Rochester Gas and Electric Corporation ("the Utilities") hereby move the Court for leave to file the brief of *amici curiae* bound with this motion. Consent was refused by counsel for Natural Resources Defense Council, *et al.*, parties to the cases which are the subjects of Petition Numbers 76-419 and 76-548. EEI and the Utilities have received the written consents of counsel for all other parties to these cases to file the brief *amici curiae*. Copies of the consents have been filed with the Clerk. The brief urges the Court to grant the petitions.

EEI and the Utilities have an interest in this Court's disposition of the Petitions for Writs of Certiorari to the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council, Inc., et al. v. United States Nuclear Regulatory Commission,* No. 74-1385, and *Natural Resources Defense Council, Inc. and Consolidated National Intervenors v. United States Nuclear Regulatory Commission,* No. 74-1586 (D.C. Cir. July 21, 1976).[1] This interest arises from the participa-

[1] The slipsheet copy of the opinion is set out at Appendix to the Vermont Yankee Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia ("Pet. App.") A-1 to A-59 (*filed*, U.S. September 21, 1976) (No. 76-419). *See* Petitioner's Supplemental Brief and Supplemental Appendix, (*filed*, U.S. December 6, 1976) (No. 76-419) for a discussion of subsequent procedural developments. In addition to the Vermont Yankee and Baltimore Gas and Electric petitions, there are two other related petitions for writs of certiorari: Nos. 76-528 and 76-745.

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tion by EEI and the Utilities in the rulemaking proceeding before the Atomic Energy Commission [2] which was reviewed by the court of appeals in the aforementioned opinion, from the participation by the Utilities as *amici curiae* in that review by the court of appeals,[3] from the status of the Utilities and many of EEI's members as licensees and applicants for licenses for nuclear power plants, and from EEI's concern with the development of sound policies and procedures for the regulation of the electrical utility industry.

EEI is the principal national association of electric utility companies. EEI members represent 99.1% of all customers of the investor-owned segment of the electric utility industry and 77.1% of the Nation's electricity users. These member companies are licensees or applicants for licenses for 178 of the 205 commercial nuclear power units currently licensed by, or in licensing before, the Commission.[4] Among EEI's interests are the development of sound policies and procedures for regulation of the construction of nuclear power plants and the production and generation of electricity through the use of nuclear power.

The Utilities are investor-owned and public entities that construct and operate power plants to provide

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[2] URANIUM FUEL CYCLE, USAEC Docket No. RM-50-3, Letter from Arvin E. Upton, Esq., transmitting Written Comments of Alabama Power Company, *et al.* (January 15, 1973); Oral Comments of Arvin E. Upton, Esq., Tr. 12-14, 35, 46-47 (January 17, 1973); Supplementary Written Statement of Alabama Power Co., *et al.* (March 19, 1973).

[3] Brief of *Amici Curiae*, NRDC v. AEC, No. 74-1586, (*filed*, D.C. Cir. December 9, 1974).

[4] USNRC, FACILITIES LICENSE APPLICATION RECORD (September 30, 1976).

electricity to their customers. Each of the Utilities has an interest in one or more nuclear power plants for which construction permits or operating licenses have been issued by the Commission or for which construction permit applications are pending before the Commission.[5] The Utilities collectively have invested billions of dollars on those plants.[6]

EEI and the Utilities have carefully reviewed the Petitions for Writs of Certiorari and the Petitioner Vermont Yankee's Supplmental Brief, as well as the responses of the federal and non-federal respondents. EEI and the Utilities respectfully submit that their brief lodged herewith presents a different and relevant statement of the issues in the petitions and an additional issue with respect to the correctness of the remedy prescribed by the court of appeals. It is the view of EEI and the Utilities that the Court need not reach the issue whether simple notice and comment procedures would have been sufficient as suggested or the issue whether the "hybrid" procedures discussed in *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), were followed. Rather EEI and the Utilities would have the Court consider whether the procedures actually used by the Commission were sufficient.

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[5] The Utilities hold operating licenses for fourteen nuclear power units (9,075 megawatts ("MWe")), construction permits for seven units (7,736 MWe) and have applications in earlier stages of licensing review for three units (3,477 MWe).

[6] At an estimated value of $680 per kilowatt, the Utilities' nuclear power units represent an investment of approximately $14 billion in 1974 dollars. *See* USAEC, THE NUCLEAR INDUSTRY 1974, WASH 1174-74 (1974), Table 2-2.

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For these reasons, EEI and the Utilities respectfully urge the Court to grant this motion for leave to file their brief, bound with this motion, as *amici curiae*.

Respectfully submitted,

CAMERON F. MACRAE

LEONARD M. TROSTEN
LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

Attorneys for Edison Electric Institute, et al.

Of Counsel:

HARRY H. VOIGT
JAMES P. MCGRANERY, JR.
LEBOEUF, LAMB, LEIBY & MACRAE
1757 N Street, N.W.
Washington, D.C. 20036

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TABLE OF CONTENTS

Page

BRIEF FOR AMICI CURIAE 1

INTEREST OF AMICI CURIAE 2

SIGNIFICANCE OF THE DECISION BELOW 2

BACKGROUND 2

ARGUMENT

I. The Court of Appeals Erred in Requiring Oral Proceedings on Remand and Curbing the Commission's Discretion in Rulemaking Procedures 7

II. The Court of Appeals Improperly Applied the "Arbitrary" or "Capricious" Standard to the Commission's NEPA Description of Certain Fuel Cycle Impacts 14

III. The Court of Appeals Misapprehended a Decision of this Court in Deciding the Rule Should be Vacated 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES:

Aberdeen & Rockfish Railroad v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), 422 U.S. 289 (1975) 12, 15, 19

BPI v. AEC, 502 F.2d 424 (D.C. Cir. 1974) 13

Calvert Cliffs' Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971) 3, 12

Camp v. Pitts, 411 U.S. 138 (1973) 16, 21

Page

FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976) 8, 21

Industrial Union Department v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974) 19

International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973) 8, 11

Kleppe v. Sierra Club, — U.S. —, 96 S.Ct. 2718 (1976) 18, 19

Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972) 16, 18

Scientists' Institute for Public Information v. AEC, 481 F.2d 1079 (D.C. Cir. 1973) 16, 19, 20

Siegel v. AEC, 400 F.2d 778 (D.C. Cir. 1968) 10, 13, 20

Union of Concerned Scientists v. AEC, 499 F.2d 1069 (D.C. Cir. 1974) 13

United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972) 8

United States v. Florida East Coast Railway, 410 U.S. 224 (1973) 8, 12

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-56, 4 AEC 930 (1972) 3

Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-179, 7 AEC 159 (1974) 3

STATUTES:

Administrative Procedure Act, 5 U.S.C. § 553 (1970 & Supp. V 1975) 9, 10

Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2282 (1970 & Supp. V 1975) 2, 10

Energy Reorganization Act of 1974, Pub. L. No. 93-438, 88 Stat. 1233 (codified in scattered sections of 5, 40, 42 U.S.C.) 2

National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975) 3

BLEED THROUGH POOR COPY

Page

REGULATIONS:

10 C.F.R. Part 50, App. F (1976) 19

40 C.F.R. § 1500.8 (1976) 5, 12

MISCELLANEOUS:

37 Fed. Reg. 24,191 (1972) 3

38 Fed. Reg. 49 (1973) 5

39 Fed. Reg. 14,188 (1974) 6

DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES (1976).. 11

ERDA Authorizing Legislation Fiscal Year 1977: Hearings Before the Subcom. on Legislation of the Joint Comm. on Atomic Energy, Part 2, 94th Cong., 2d Sess. (1976) 20

Exec. Order No. 11,834, 3A C.F.R. 111 (1975), *reprinted* in 42 U.S.C. § 5801 app., at 3866 (Supp. V 1975) 2

USAEC, AEC GASEOUS DIFFUSION PLANT OPERATIONS, ORO-684 (January 1972) 17

USAEC, ENVIRONMENTAL SURVEY OF THE NUCLEAR FUEL CYCLE (November 1972) 4, 17, 18

USAEC, ENVIRONMENTAL SURVEY OF THE URANIUM FUEL CYCLE, WASH-1248 (April 1974) 4, 5, 17, 18

USAEC, URANIUM FUEL CYCLE, Docket No. RM-50-3.. 6

Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375 (1974) 11

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INTEREST OF *AMICI CURIAE*

The interest of the *amici curiae* is stated in their motion for leave to file this brief, which is bound together with the brief.

SIGNIFICANCE OF THE DECISION BELOW

The court of appeals set aside and remanded the Commission's [1] rule due to alleged failings in the treatment of environmental impacts of radioactive waste disposal and reprocessing, and remanded the full-term operating license of the petitioner, Vermont Yankee Nuclear Power Corporation, to await the outcome of further proceedings in the rulemaking.[2] If this decision is allowed to stand it will have serious consequences in subjecting the Commission and other agencies to an unknowable procedural burden which agency caution is sure to convert into delays. Such delays will have an impact not only on those entities directly involved in nuclear power plant licensing proceedings before the Commission, but also upon consumers of electricity throughout the country and all other regulated industries.

BACKGROUND

During the proceedings to determine whether to issue an operating license for the Vermont Yankee Nu-

[1] The term "the Commission" is used herein to refer to both the U.S. Atomic Energy Commission ("AEC") and the agency that succeeded to its regulatory responsibilities on January 19, 1975, the U.S. Nuclear Regulatory Commission ("NRC"). 42 U.S.C. §§ 2011-2282 (1970 & Supp. V 1975); Pub. L. No. 93-438, 88 Stat. 1233 (codified in scattered sections of 5, 40, 42 U.S.C.); Exec. Order No. 11,834, 3A C.F.R. 111 (1975), *reprinted in* 42 U.S.C. § 5801 app., at 3866 (Supp. V 1975).

[2] Pet. App. A-44; Pet. App. A-13.

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clear Power Station, an intervenor raised the question whether certain environmental impacts associated with the reactor's fuel, but which occur away from the plant site in separately licensed activities, should be part of the Commission's environmental analysis of the power plant pursuant to the National Environmental Policy Act of 1969[3] ("NEPA").

The Commission's Atomic Safety and Licensing Appeal Board concluded on June 6, 1972 that some such environmental costs should be included but that others should not be included.[4] In particular, the Appeal Board decided to include the impacts of transportation of spent fuel, low-level wastes, and high-level wastes from the reactor to their respective destinations in the cost-benefit analysis of the reactor, but to exclude the environmental impacts of the reprocessing plant and waste disposal facilities. Pet. App. A-63.

Five months later the Commission initiated the rulemaking that is the subject of the opinion below. 37 Fed. Reg. 24,191 (November 15, 1972) (Pet. App. A-121). In its notice, the Commission recognized that, in several licensing proceedings, intervenors had raised the question whether the environmental effects of distinct and geographically unrelated activities which comprise the uranium fuel cycle[5] should be included

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[3] 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975); *see* Calvert Cliffs' Coordinating Comm., Inc. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).

[4] Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-56, 4 AEC 930 (1972), Pet. App. A-60 to A-77; Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station) ALAB-179, 7 AEC 159 (1974), Pet. App. A-78 to A-120.

[5] These activities cover, in industrial sequence, mining of urani-

in the cost-benefit analysis of each reactor. The Commission went on to state that it was considering a rule to amend its regulations on environmental matters in one of two ways.[6] The first alternative was to exclude the consideration of these fuel cycle activities on the basis that a reactor's annual share of the environmental impacts of the supporting activities is "sufficiently small as not to affect significantly the" decision whether to approve construction and operation of the reactor. Pet. App. A-125. The second alternative was to include a calculation of normalized [7] impacts in the en-

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um ore, extraction of triuranium octoxide (U_3O_8) from that ore in the milling process, conversion of the U_3O_8 to a gas (uranium hexaflouride or UF_6), enrichment (concentration) of the U_{235} contained therein from its natural concentration (approximately 0.711 percent) to approximately 2-4 percent, and then its fabrication as fuel by a) re-conversion into the solid uranium dioxide (UO_2), b) pelletization, and c) insertion into fuel rods for use in the reactor After the fuel is used in the reactor it may be stored permanently, or reprocessed for the reuse of some parts and the storage of the remainder.

[6] The participants in the rulemaking were not forbidden from presenting other alternatives. A third alternative was presented and rejected by the Commission. Pet. App. A-137.

[7] The concept of "normalization" is important to an understanding of the rulemaking. With respect to both the scale and processes of the reactor and the fuel cycle activities, the Commission chose characteristics which were representative of the present industry to emphasize the most severe impact. This results in a conservative (or high) estimate of the overall impact.

An example of this approach is the choice of shorter useful lives for various activities than experience would indicate. This factor alone exaggerates the fixed environmental costs. For example, the land use for each of the supporting activities (except waste management where the commitment was permanent) was exaggerated by estimating a useful life of only 20 years. USAEC, ENVIRONMENTAL SURVEY OF THE NUCLEAR FUEL CYCLE (November 1972) ("Original Environmental Survey") S-1 to S-48; USAEC, ENVIRONMENTAL SURVEY OF THE URANIUM FUEL CYCLE, WASH-1248

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vironmental statement on each reactor. That normalized statement of numerical values would cover the various environmental impacts of conducting all the fuel cycle activities which occur beyond the power reactor site boundary. The proposed impact table also would put those numbers in perspective by comparison with the impacts of other more familiar activities, such as, coal plants, natural background radiation, and the reactor itself.[8] Pet. App. A-262. The technical basis for both alternatives, the 310 page double-spaced Original Environmental Survey, was published at the same time.

To receive comments on the proposed rule, the Commission appointed a three-member hearing board.[9] All interested persons were invited to submit oral or written statements at a legislative "rather than an adjudicatory hearing" to begin on February 1, 1973. Pet. App. A-127 to A-128. The initial written comments were requested by January 14, 1973. *Id.*

The Commission later issued further procedural instructions directing that the hearing should be "conducted as informally and as expeditiously as practicable, consistent with affording the participants a reasonable opportunity to present their positions." Pet.

(1974) ("Final Environmental Survey") S-1 to S-33. As the Commission said in its decision, these calculations were only intended to be descriptive in generating conservative terms and were not intended to be actual costs for any particular reactor and were not intended to set licensing limits. Pet. App. A-140.

[8] This comparative approach is in line with the Council on Environmental Quality's Guidelines ("CEQ Guidelines") on the preparation of environmental impact statements. 40 C.F.R. Part 1500.8 (1976).

[9] The board was appointed by notice at 38 Fed. Reg. 49 (1973) (Pet. App. A-130).

App. A-131. In addition, the Commission said that both oral and written statements would be "subject to questioning" by the board. *Id.* The board was empowered to hold one or more procedural planning sessions; such a session was held on January 17, 1973. Then the board was to hold an oral hearing and, after allowing thirty days further for the submission of supplementary written statements, the board was directed to forward the entire record to the Commission accompanied by an identification of the issues but without any recommendation or initial decision from the board. The Commission itself would make the decision. Pet. App. A-132. The oral hearing was held on February 1 and 2, 1973, and all parties were allowed the *full* time for oral presentation which they requested.[10]

The non-federal respondents in this Court requested, and were granted, an extension of time in which to file their supplemental written statement.[11] On July 6, 1973, the board forwarded the record to the Commission with the board's report identifying nine issues to be considered by the Commission. Pet. App. A-136 to A-146.

On April 16, 1974, the Commission issued the final rule accompanied by a 260 page single-spaced Final Environmental Survey to take account of information made available during the rulemaking. 39 Fed. Reg. 14,188 (1974) (Pet. App. A-133 to A-134). The Commission briefly discussed all issues identified by the board and concluded that, although the sum of these

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[10] URANIUM FUEL CYCLE, USAEC Docket No. RM-50-3, Tr. 9-26 (January 17, 1973).

[11] URANIUM FUEL CYCLE, USAEC Docket No. RM-50-3, Motion of Consolidated National Intervenors/Union of Concerned Scientists in Request of Schedule Rearrangement (February 27, 1973) and Order Granting Extension of Time (March 9, 1973).

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fuel cycle costs is "relatively insignificant" in the consideration of whether to license a power reactor, the Commission "favors" the approach of the second alternative because "it quantifies, to the fullest extent practicable, the environmental effects of the uranium fuel cycle in individual cost-benefit analyses." Pet. App. A-143 to A-144.

The non-federal respondents in this Court filed a petition for review of the final rule in the court of appeals on June 7, 1974. That proceeding was consolidated with the petition for review of the Vermont Yankee license, and oral argument was held May 27, 1975. The decision below, which is the subject of the petitions for writs of certiorari, issued July 21, 1976.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN REQUIRING ORAL PROCEEDINGS ON REMAND AND IN CURBING THE COMMISSION'S DISCRETION IN RULEMAKING PROCEDURES.

On the procedural issues, the court of appeals' judgment and opinion is inconsistent with this Court's interpretations of the Administrative Procedure Act because it would require oral proceedings and otherwise restrict the Commission's statutory latitude as to the procedure for a rulemaking to estimate environmental impacts under NEPA. The opinion below also offends reason in suggesting that trial-type procedures are required for the consideration of a developing technical area, the long-term storage of high-level waste, while finding the Commission's procedures adequate for those areas of the uranium fuel cycle where tech-

nology has already matured into actual, licensed facilities. That is, the opinion appears to require trial-type examination of conceptual design but not of fully developed engineering and hardware. Finally, the opinion below is inconsistent with the opinion of this Court in *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976), which requires the courts of appeals to restrain themselves from dictating administrative procedures on remand.

This Court should reverse the decision of the court of appeals and find that the combination of procedures employed by the Commission in this instance was appropriate to the task at hand. In so doing, this Court need not reach the issue whether notice and opportunity for written comment would have sufficed because the Commission went further. *See United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972); *United States v. Florida East Coast Railway*, 410 U.S. 224 (1973). Furthermore, this Court need not reach the issue whether the "hybrid" procedures developed pursuant to *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973), were followed in this instance because they are neither necessary nor appropriate to this type of administrative action.

While the court below professed restraint from "intrud[ing] on the agency's province by dictating to it which, if any, of [certain] procedural devices it must adopt to flesh out the record," it did so intrude by holding that an oral proceeding would be required on remand. Pet. App. A-40; A-42 n.62. The opinion immediately reiterates that it does "not intimate that [the Commission] must adopt any of" the procedures set out in note 15 *infra*. However, this avails little in the face of the holding that oral proceedings are required.

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In his *"separate statement concurring in result"*, Judge Tamm wrote: "More procedure will not, in this case, guarantee a better record, and a better record can be generated without reopening the oral proceeding at this time." Pet. App. A-53. In the "Opinion for the Court," Chief Judge Bazelon held:

> Evidently Judge Tamm would permit Dr. Pittman to supplement his testimony without giving those who disagree an opportunity to criticize or comment on the new material (*e.g.*, 'without reopening the oral proceeding,' Concur at 3). *We would not agree.* Pet. App. A-42 n.62 (emphasis added).

The conclusion that oral proceedings are necessary to the rulemaking rejects the flexibility accorded to agencies by Section 553 of the Administrative Procedure Act to have notice and comment procedures "with or without opportunity for oral presentations." 5 U.S.C. § 553(c) (1970 & Supp. V 1975).

In this matter, we respectfully suggest the analysis of the United States [12] is in error: The United States relies on Judge Tamm's statement in place of the "Opinion for the Court." Yet there was a clean line of dispute between the "Opinion for the Court" which found that oral proceedings would be necessary and Judge Tamm's *"separate statement concurring in result"* which said they should not be necessary. For the same reason, the analysis by respondents Natural Resources Defense Council, *et al.*, is incorrect. Brief in

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[12] Brief for the Federal Respondents 9-10. Indeed, even assuming that a holding of record deficiency can be discerned from the opinion as corrected, that holding is, at best, an alternative holding that does not vitiate the clear direction of the court that proceedings on remand must include oral proceedings.

Opposition 3-5. This holding flatly usurps the discretion accorded the Commission under its own statute [13] and the Administrative Procedure Act,[14] which discretion has been recognized by the same court of appeals. *See, e.g., Siegel v. AEC*, 400 F.2d 778, 785 (D.C. Cir. 1968).

The opinion below did not stop there: it went on to enumerate most, if not all, of the significant procedural devices developed in the history of the common law [15] and concluded "It may be that no combination of the procedures mentioned above will prove adequate, and *the agency will be required to develop new procedures* to accomplish the innovative task of implementing NEPA through rulemaking." Pet. App. A-40 (emphasis added). This observation was coupled with the not entirely optimistic statement that the Commission's original procedures (notice with written and oral comment) "might suffice" if they were "administered in a more sensitive, deliberate manner." *Id.* This language of the opinion does not have any of the optimistic tone inferred by the United States in the Brief for the Federal Respondents. Brief for the Federal Respondents 9-10. This obsession of the United States Court of Appeals for the District of Columbia Circuit with "inno-

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[13] 42 U.S.C. § 2239(a) (1970).

[14] 5 U.S.C. § 553 (1970 & Supp. V 1975).

[15] The opinion below reads: "Many procedural devices for creating a genuine dialogue on these issues were available to the agency—including informal conferences between intervenors and staff, document discovery, interrogatories, technical advisory committees composed of outside experts with differing perspectives, limited cross-examination, funding independent research by intervenors, detailed annotation of technical reports, surveys of existing literature, memoranda explaining methodology." Pet. App. A-40.

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vative" devices, or *ad hoc* procedures, has been criticized by many authorities. *See, e.g.,* DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES 668 (1976); Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review,* 59 CORNELL L. REV. 375 (1974). If the court of appeals is allowed to continue down this path, it will only serve to erode, if not destroy, the utility of rulemaking as a regulatory tool. In this respect, the Commission's view of the decision below is far more important than the United States' interpretation, since it is the Commission's view which will govern future administrative procedings unless the decision below is reversed.

The asserted basis for the procedural approach taken by the court of appeals in the decision below is a line of decisions in that Circuit (*e.g., International Harvester Co. v. Ruckelshaus, supra*) and one decision of the Fourth Circuit, all of which require or approve "hybrid" rulemaking in the context of the statutes there in question. Pet. App. A-16 n.23. This Court need not, however, consider whether the Commission sought to follow such procedures on paper but failed to administer them properly. Pet. App. A-40 n.59. Those so-called *International Harvester* procedures were developed in the context of particular statutes (which do not apply here) that required specific findings to be made in reaching individual decisions where, in some instances at least, there would be an individualized economic effect.[16] Thus, even if "hybrid" procedures

[16] This summary is not intended to indicate that the hybrid approach is limited to this particular combination of circumstances. On the other hand, it is intended to indicate that something more is needed for resort to these procedures than a robot-like invocation that the question at issue is a "technological" one.

were appropriate in those decisions on the basis of the particular statutes and perhaps on the basis of considerations of due process, such bases do not exist in this case. *See United States v. Florida East Coast Railway*, 410 U.S. at 244-46. Here, by contrast, the Commission's purpose was to develop, under its flexible rulemaking authority, a description [17] of some of the indirect or secondary impacts to be included in the *Calvert Cliffs'* cost-benefit analysis [18] for individual reactors.

Moreover, the procedures suggested by the court of appeals are wholly inappropriate to estimate the environmental impacts of a facility for the long-term storage of high-level wastes. Such a facility has never been constructed in this country. At the time of the rulemaking, the conceptual design stage had just been reached as the decision below recognizes. Pet. App. A-25 to A-26. Thus, there were no engineering details con-

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[17] The Commission explicitly said in its Statement of Consideration on the final rule ". . . the Environmental Survey and the Summary Table of Values are purely descriptive and are not intended as operating limits which may be imposed in licensing and regulatory actions with respect to the various fuel cycle facilities." Pet. App. A-144.

[18] The CEQ Guidelines indicate that environmental statements should cover the secondary or indirect consequences of the proposed action for the environment. 40 C.F.R. § 1500.8(a)(3)(ii) (1976). This concept of a cost-benefit analysis originated not in NEPA but in the language of the *Calvert Cliffs'* opinion. Calvert Cliffs' Coordinating Comm. v. AEC, 449 F.2d at 1113. However, the impacts discussed in this rule may go beyond the relatively limited geographical concept stated in the CEQ Guidelines (*e.g.*, "the area in question"), although they may be included in the concept of "infrastructure." 40 C.F.R. § 1500.8(a)(3)(ii) (1976). Further, the *Calvert Cliffs'* interpretation of NEPA requirements is in doubt. *Cf., e.g.*, Aberdeen & Rockfish R.R. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.), 422 U.S. 289, 321 n.20 (1975) ("SCRAP II").

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cerning the precise environmental impacts of building and operating such a plant.[19] The court of appeals did not discuss the procedures as applied to fuel cycle activities other than reprocessing and waste management. In fact, the opinion below appears to find that the Original Environmental Survey was sufficient in itself to support "the staff's conclusions" without resort to the written comments, the oral proceedings, or the changes reflected in the Final Environmental Survey. Pet. App. A-24.

Finally, the decision below indicates that the determination of normalized environmental impacts requires resort to special, but perhaps unknown, procedures due to the "innovative task of implementing NEPA through rulemaking." Pet. App. A-40. To the contrary, NEPA requires no special procedures but rather may be fulfilled through the normal procedures utilized by the agency in carrying out its substantive responsibilities. *Union of Concerned Scientists v. AEC*, 499 F.2d 1069, 1078-79 (D.C. Cir. 1974). Nor is there anything unusual about an agency, especially one with "broad responsibility . . . free of close prescription" such as the Commission, relying on expert judgment in finding such normalized facts as the indirect impacts involved here, rather than insisting upon cross-examination before doing so.[20]

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[19] This is not the same as an absence of facts on the storage of wastes. See note 23 *infra*.

[20] Siegel v. AEC, 400 F.2d at 785. This view of the special latitude afforded the Commission has been repeatedly cited by the courts of appeals. *See, e.g.*, BPI v. AEC, 502 F.2d 424, 428 n.3 (D.C. Cir. 1974).

II.

THE COURT OF APPEALS IMPROPERLY APPLIED THE "ARBITRARY" OR "CAPRICIOUS" STANDARD TO THE COMMISSION'S NEPA DESCRIPTION OF CERTAIN FUEL CYCLE IMPACTS.

The court below applied incorrect legal principles to determine whether the Commission had sufficient basis for the normalized factual conclusions which it reached in describing, for the purposes of NEPA, the impacts of reprocessing and waste disposal. Pet. App. A-44.

With respect to the long-term storage of high-level radioactive wastes, the court of appeals devoted a major part of its opinion to a discussion of the lack of detailed information on the facilities and of the absence of a "genuine dialogue" or adversary debate about the "basic philosophical issues concerning man's ability to make commitments which will require stable social structure for unprecedented periods." Pet. App. A-36. The decision below also said that the Commission had inadequately articulated its reasoning and failed to specify the evidence on which it relied. Pet. App. A-42. However, the principal specific criticism of the record was withdrawn by the court in its order of October 8, 1976, correcting the opinion. Petitioner Vermont Yankee's Supplemental Appendix SA-1 to SA-2.

With respect to the alleged inadequacy of the Commission's findings on the impact of reprocessing, the decision below contains nothing but a conclusory statement of inadequacy.[21]

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[21] In Part III of the opinion below (which deals with the rulemaking), the court of appeals mentioned the word "reprocessing" seven times and gave only one hint why the treatment of reprocessing was deemed inadequate. Pet. App. A-24 (twice), A-28, A-33

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These conclusions are inconsistent with this Court's directives on how a reviewing court should determine whether there is sufficient support in the record for an agency's decision. Further, the decision below places a burden on the Commission and other agencies in providing information for NEPA consideration which is contrary to the interpretation of NEPA by this Court.

In general, the Commission based its final conclusions on the full rulemaking docket and on its expertise. *See SCRAP II, supra* note 18, at 320-21. The Commission's rulemaking decision has as its basis the 260 page single-spaced Final Environmental Survey, the written comments of 46 participants and the Regulatory Staff, the 520 page transcript of the oral proceedings, all documents referenced in the foregoing, the board's report to the Commission, and finally, the 4,000 word Statement of Consideration issued by the Commission with the final rule. These materials included supplementary information filed to correct the deficiency, alleged by one board member, in the waste management discussion in the Original Environmental Survey.

In its Statement of Consideration, the Commission addressed all nine issues identified by the board in an adequate, if brief, fashion. Pet. App. A-136 to A-145.

(twice), A-35, A-41, and A-44. In footnote 51, the opinion cites a government report issued one year *after* the final rule which stated that " 'there are still many technical problems and uncertainties in the overall area of processing of spent fuel and properly managing its radioactive waste.' " Pet. App. A-33. The fact that there are "technical problems and uncertainties" does not vitiate the ability of the Commission to make an adequate estimate of the environmental effects of reprocessing on the basis of its experience, for the purpose of NEPA disclosure.

The opinion of this Court in *Camp v. Pitts*, 411 U.S. 138, 143 (1973), indicates that while the agency is required to state its rationale, that statement may even be "curt." The agency is not required to state its findings in the detail required of a trial judge sitting without a jury; rather the reviewing court is to survey the "administrative record" as a whole. *Id.* at 142.

The court of appeals has previously held that there is "some degree of flexibility and agency discretion in determining the content of impact statements." *Scientists' Institute for Public Information, Inc. v. AEC*, 481 F.2d 1079, 1091 (D.C.Cir. 1973) *("SIPI")*, and that "[t]he statute must be construed in the light of reason if it is not to demand what is fairly speaking, not meaningfully possible. . . ." *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972). Thus, the court of appeals in *SIPI* found that NEPA requires only ". . . a good faith effort in the survey to describe the reasonably foreseeable environmental impact of the program." 481 F.2d at 1092. These decisions indicate that even a lesser level of detail is necessary in the record for direct impacts of a project than the court below would require for indirect impacts, stated in a normalized format.

As to the impacts of both reprocessing and long-term wastes attributable to a hypothetical reactor, the court below said that the "kind of detailed explanation and support for the staff's conclusion [for the other phases of the fuel cycle] was noticeably absent from the Environmental Survey *as originally published.*" Pet. App. A-24 to A-25 (emphasis added). However, this ignores the true question: the sufficiency of detail in the Final Environmental Survey and the entire ad-

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ministrative record.[22] Further, the sufficiency of the record on these two fuel cycle activities should be judged in the light of the type of factual information available on reprocessing and long-term storage of high-level waste at that time. Only one civilian reprocessing facility had ever operated (two were in the licensing process), and no permanent long-term high-level waste storage facility had been built. Pet. App. A-25 to A-26. Thus, the conclusions of the staff witnesses and, ultimately, the Commission as to those two stages of the fuel cycle were necessarily based, to a greater degree, on judgment and conceptual analysis. In contrast, there were 222 mines (Original Environmental Survey, A-8), approximately 20 mills (Original Environmental Survey, B-7), two conversion plants with a total production of 10,000 metric tons per year (Original Environmental Survey, C-2), three enrichment plants that had operated for nearly 70 plant years[23] (Original Environmental Survey, D-1),

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[22] There was a considerable difference between the Original and Final Environmental Surveys in the degree of detail afforded the discussion of reprocessing and waste management. *Compare* Original Environmental Survey, Table S-3A and Chapters F and G, *with* Final Environmental Survey, Table S-3A and Chapters F and G. For example, in volume terms, the original devoted 58 double-spaced pages to the discussion of these subjects while the final had 61 single-spaced pages of discussion. And while, in the Original Environmental Survey, the Commission had discussed explicitly only its experience in the civilian power reactor program, the Final Environmental Survey also discussed and relied on the more extensive experience in the Government's own program of reprocessing and waste management since the 1940's. *See* Final Environmental Survey, F-15 through F-19.

[23] USAEC, AEC Gaseous Diffusion Plant Operations, (ORO-684), 11-13 (January 1972).

and ten fuel fabrication plants (Original Environmental Survey, E-7).

In reaching its conclusions with respect to the impacts of reprocessing, the Commission relied on its experience with the operation of the one plant and the design and construction of the other two (Final Environmental Survey, Section F), as well as the extensive experience since the 1940's with high-level wastes in the Government program, and took only minimal credit for currently developing improvements in technology (Final Environmental Survey, S-2). Further, the Commission took specific account of the respondent's criticisms of the reprocessing calculations in the Final Environmental Survey and recognized them in its Statement of Consideration. Pet. App. A-141 n.3.

The Commission's estimate of the impacts of long-term high-level waste storage were perforce made on the basis of design concepts and analyses, but NEPA requires no more. The court below fails to recognize that the Commission was not considering the approval of the long-term waste storage facility, and thus the "factual predicate" necessary for detailed analysis was absent. *Cf., Kleppe v. Sierra Club*, —— U.S. ——, ——, 96 S. Ct. 2718, 2727 (1976); *Natural Resources Defense Council, Inc. v. Morton*, 458 F.2d at 837 ("... more germane to subsequent proposals . . ., in the light of changes in technology or in [other] variables. . . ."). Rather the Commission was making descriptive estimates from experience with the storage of high-level wastes in the Government program, as well as at the only civilian reprocessing plant to have operated to date, and its relied on that experience. Pet. App. A-141 n.3. Such wastes will be kept at the reprocessing plant

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until a long-term storage facility is constructed by the Energy Research and Development Administration and licensed by the Commission.[24] Until a definite design and location is proposed, one cannot determine answers to the questions on the details of high-level waste management posed by the court below.[25] Nor does NEPA require such answers. "Certainly NEPA does not require the Commission to forecast the deployment and effects of LMFBR power reactors in the year 2000 in the same detail or with the same degree of accuracy as another agency might have to forecast the increased traffic congestion likely to be caused by a proposed highway." *SIPI*, 481 F.2d at 1092. The Commission and the Energy Research and Development Administration are currently pursuing their respective licensing and management responsibilities for high-level wastes and reprocessing. More detailed environmental treatment will be accorded these subjects in those "more appropriate" proceedings. *SCRAP II, supra* note 18, at 322-28.

The estimate given by the Commission based on its expertise and experience with military and civilian high-level wastes was sufficient for the task at hand. When only facts on the frontier of science are available, the rulemaking must "depend to a greater extent upon policy judgments and less upon purely factual analysis." *Industrial Union Department v. Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974). This is not to say, of course, that the Commission is proceeding in the absence of reasonable near-term and intermediate-

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[24] The Commission's regulations currently require this approach. 10 C.F.R. Part 50, Appendix F (1977).

[25] *See* Kleppe v. Sierra Club, —— U.S. at ——, 96 S.Ct. at 2727.

term solutions. The Commission has had experience with the management of high-level wastes since the 1940's. The current inventory of high-level wastes from the Government programs is approximately 75.6 million gallons, or more than *ten times* the amount of such waste that will be generated by the entire civilian nuclear power industry by the year 2000. *ERDA Authorizing Legislation Fiscal Year 1977: Hearings Before the Subcomm. on Legislation of the Joint Comm. on Atomic Energy, Part 2*, 94th Cong., 2d Sess., Chart VII at 1460, 1464 (1976).

Moreover, it is to be hoped that the court of appeals is not correct in assuming that the assessment of environmental impacts must entertain philosophical debates as to whether our society will remain stable for 250,000 years. Pet. App. A-36. Such an exercise would surely be a sally into the unforeseeable. *SIPI*, 481 F.2d at 1092. The Commission satisfied NEPA when it described the radionuclides and other impacts, including the commitment of land as "permanent."[26] The court of appeals has approved a Commission rule which excludes considerations of war from the health and safety review of reactors. *Siegel*, 400 F.2d at 784. If the Commission can exclude from consideration such a drastic condition, which is nonetheless within our experience, in carrying out its basic health and safety responsibilities, it can surely decline to debate whether the Constitution will endure for 250,000 years.

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[26] *See* Table S-3 (Pet. App. A-148), and corresponding Regulation (Pet. App. A-261 to A-262).

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III.

THE COURT OF APPEALS MISAPPREHENDED A DECISION OF THIS COURT IN DECIDING THE RULE SHOULD BE VACATED.

Assuming *arguendo* that the court of appeals was correct in finding the rulemaking procedures lacking and the amount of information on long-term, high-level waste storage inadequate, the separate statement of Judge Tamm was correct in arguing that the rule should not have been vacated. The majority below erred in applying *Camp v. Pitts,* 411 U.S. at 143.[27] In that case the "'vacating" of the "rule" did not change the *status quo:* The Comptroller of the Currency had denied Pitts the bank charter which he sought; the remand did not give Pitts that charter but, at most, required that the matter be looked at again by the Comptroller "for further consideration." That is precisely what Judge Tamm argued the court of appeals should have done here.

To remand the rule without vacating it is not always an appropriate remedy, but it is in this case. The rule did two things: It quantified a hypothetical reactor's share of the impacts of all seven supporting activities of the fuel cycle and the attendant transportation, and it concluded that the sum of all eight of those indirect impacts was insignificant in the cost-benefit analysis of a reactor. Before the opinion was corrected, the court below faulted the development of the record with respect to the questioning of one witness on the impact quantification of only parts of

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[27] The opinion below also relies on FPC v. Transcontinental Gas Pipe Line, *supra.* Pet. App. A-44, n.65. In that case, the *status quo* was preserved effectively by the establishment of an escrow for the amount of money in dispute. *Id.* at 328 n.1.

two of those eight supporting activities, but found that the Commission's statement as to the total of those costs was a "fair summary." Pet. App. A-15. The court of appeals also upheld the Commission's determinations of all the other fuel cycle impacts. In these circumstances, it would be extremely difficult to conclude that the overall conclusion could be significantly altered by further consideration.

In short, since the court of appeals found no substantial fault with the rule as a whole, vacating it was inappropriate. The court of appeals should, at most, have remanded the rule for further proceedings without vacating it.

The truly dangerous potential of this decision is in the unpredictable procedural burden which the court of appeals is placing on the Commission and other agencies in the future. This danger is further magnified by the inappropriate remedy.

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CONCLUSION

For the reasons stated above, as well as those stated by the Petitioners and the Nuclear Regulatory Commission, the petitions for writs of certiorari should be granted.

Respectfully submitted,

CAMERON F. MACRAE
LEBOEUF, LAMB, LEIBY & MACRAE
140 Broadway
New York, New York 10005

Attorney for Edison Electric Institute, et al.

Of Counsel:

LEONARD M. TROSTEN
HARRY H. VOIGT
JAMES P. MCGRANERY, JR.
LEBOEUF, LAMB, LEIBY & MACRAE
1757 N Street, N.W.
Washington, D.C. 20036

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